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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 579

PACIFIC GAS AND ELECTRIC COMPANY
(a corporation),
Petitioner,

vs.

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The petition for certiorari should be denied for the following reasons:

1. Petitioner says that the state statute in question is unconstitutional because it places a penalty upon the right to go into the Federal Court. But the statute does not impose a penalty or condition the right to go into the Federal Court. The statute applies equally in the state courts and in the federal courts. Obviously if it were to apply only in the state court it would penalize the right to go into the state court.

The statute is no different from any other state statute which frequently is enforced in the federal court. It would be as reasonable to say that a state statute of limitations penalizes the federal court, if the statute of limitations is invoked in the federal court, as to make the contention petitioner makes here. The state statute in question is equally applicable in state and federal courts and is enforceable without discrimination in either court.

In *People of Sioux County v. National Surety Co.,* 276 U. S. 238, this court held that a state statute imposing attorneys' fees against an insurance company which unsuccessfully defended an action would be enforced in the federal court. That case is controlling here. Attorneys' fees are not "costs" in the ordinary sense and are not governed by the federal statute relating to costs.

See also

Henkel v. Chicago St. P. M. & O. R. Co., 284 U. S. 444.

2. Petitioner's contention that a substantive right as declared by state statute shall be made to depend for its very existence simply on the court in which suit is brought does not find support in the cases.

Erie R. Co. v. Thompkins, 304 U. S. 64.

3. Attorneys' fees may properly be allowed to one party in certain classes of litigation and not to the other where public interest, policy or welfare justify it, and also where it is necessary to prevent vexatious delays as in suits against insurance companies.

Farmers and Merchants Ins. Co. v. Dobney, 189 U. S. 301;

People of Sioux County v. National Surety Co., 276 U. S. 238;

Fidelity Mutual Life Assn. v. Mettler, 185 U. S. 308;

Iowa Life Ins. Co. v. Lewis, 187 U. S. 335;

Chicago and Northwestern R. Co. v. Nye etc. Co., 260 U. S. 35;

Missouri etc. R. Co. v. Larabee, 234 U. S. 459;

Missouri etc. Co. v. Cade, 233 U. S. 642.

4. The statute is a legitimate exercise of the power of the legislature to classify.

New York Rapid Transit Corp. v. City of New York, 303 U. S. 573;

Kansas etc. R. Co. v. Anderson, 233 U. S. 325;

Atchison, Topeka & S. F. v. Matthews, 174 U. S. 96;

Borden's Farm Products v. Ten Eyck, 297 U. S. 251;

Marin Municipal Water District v. Marin Water & Power Co., 178 Cal. 308, 173 Pac. 469.

5. The claim that the state statute is illegally discriminatory because it allows a public agency to recover attorneys' fees in an unsuccessful attempt by a private utility to enjoin the sale of the public agency bonds is untenable.

Puget Sound Power and Light Company v. City of Seattle, 291 U. S. 619 (equal protection does not "forbid discrimination with respect to things that are different");

Springfield Gas & Elec. Co. v. City of Springfield, 257 U. S. 66;

Madera Water Works v. Madera, 228 U. S. 454;

Jones v. Portland, 245 U. S. 217;

New York Rapid Transit Corp. v. City of New York, 303 U. S. 573;

Nashville etc. Railway v. Browning, 310 U. S. 362;

Washington etc. Elec. Co. v. District of Columbia, 77 Fed. (2d) 366.

6. Respondent Sacramento Municipal Utility District is a public agency having general powers of taxation.

Pacific Gas & Electric Company v. Sacramento Municipal Utility District, 92 F. (2d) 365.

Its activities are in accordance with the public policy of California as declared by Article XI, Section 19 of the California Constitution.* This consti-

*Article XI, Sec. 19, California Constitution:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; *provided*, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

tutional provision is designed to encourage extension of public ownership of public utilities.

In re Orosi Public Utility Dist., 196 Cal. 43, 235 Pac. 1004.

It is a matter of judicial knowledge that the extension of public utility ownership (rightly or wrongly) has been aggressively fought by privately owned utilities. Public ownership of utilities has become a national issue. Litigation by privately owned utilities against the extension of public ownership is commonplace. Certainly the legislature could consider this in making classification.

In the insurance cases referred to above, the mere fact that many insurance companies (some rightly and some wrongly) had resisted the payment of claims was sufficient to justify legislation imposing liability for attorneys' fees on *all* insurance companies which went to court if they failed in their defenses.

It is true no injunction was issued in this case. But it is blinding one's self to realities not to see that the *mere* filing of an injunction proceeding to restrain the sale of public agency bonds in and of itself operates as a *practical* injunction. No bond counsel would approve public agency bonds where an injunction suit is pending to enjoin their issuance. No bond purchaser would buy such bonds except under the most extraordinary conditions. Surely these practical considerations are matters of common knowledge which the legislature had a right to consider. It is wholly unnecessary for the privately owned public utility to

procure a restraining order. The mere filing of the action which questions the bonds is just as effective, and far less expensive.

The practical effect therefore of filing an injunction proceeding is to suspend the sale of bonds until the litigation is terminated. The injunction suit itself, though entirely without merit, necessarily delays the public agency for the period of the suit and the time required for an appeal.

This is an additional reason which in and of itself would justify the enactment of California Section 526b.

Dated, Sacramento, California,
January 13, 1943.

Respectfully submitted,
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